11 August 2004

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington D.C. 20554

Re: WCB Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On August 10, 2004, the undersigned, together with Christopher McKee of XO Communications, made an *ex parte* presentation to Michelle Carey, Russ Hanser, Marcus Maher, Ian Dillner, and Jeremy Miller in the above-referenced dockets. The substance of the presentation is set out in the attached document.

Respectfully submitted,

/s / Jason Oxman

Jason D. Oxman
General Counsel
Association for Local
Telecommunications Services
888 17th Street, NW, Suite 1200
Washington, DC 20006
Office: 202-969-2587 / Fax: 202-969-2581
E-mail: joxman@alts.org

ALTS
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

August 10, 2004

Special access is not a substitute for UNE loops

Verizon's Claim:

- Verizon claims that 93% of its high-capacity DS-1 loop facilities are purchased by CLECs as special access services, and thus unbundled access to high-capacity loops is not needed. Verizon also claims that eliminating the top two purchasers of special access services still shows 90% DS-1 loops purchased as special access.

The Reality:

- When Verizon claims that the vast majority of loops in service are "special access" retail services, Verizon is talking about (1) large business customers and the dozens of interexchange carriers that serve those customers; (2) CMRS providers; (3) CAPs; (4) CLECs that try to order UNEs but are forced to purchase special access because of ILEC policies; (5) a very small number of CLECs that have niche business plans that permit the use of special access service. Verizon is not talking about the residential and small business customers served by the ALTS membership.
- Even when Verizon claims to revise its figures by eliminating the "top two purchasers" of special access, it still inappropriately counts IXCs, CMRS providers, CAPs, and CLECs that ordered UNEs and were forced into special access. How is it possible that Verizon can eliminate the top two purchasers of special access DS-1 loop and claim a reduction in the percentage of CLEC purchase of DS-1 loops from 93% to 90%? Is it really possible that the top two purchasers only purchase a combined 3% of DS-1 loops in Verizon's territory?
- Verizon concedes that IXCs "have dominated the provision of high-capacity services to large enterprise customers who make up the bulk of retail demand for these services – for Verizon, more than 85 percent of its sales to end-user business customers."[1] Verizon further concedes that the "big three" long distance carriers "account for nearly half of all revenues generated from larger enterprise customers and those three carriers are the primary telecommunications provider to nearly three quarters of large corporate accounts."[2]
- Verizon notes that "98% of AT&T's DS1 customer loops/EELs are leased from ILECs under their Special Access tariffs; only 2 percent are leased as UNEs."[3]

---

[1] Verizon ex parte, WCB Docket Nos. 96-98, 98-147, 01-338, "Competing Providers are Successfully Providing High-Capacity Services to Customers Without Using Unbundled Elements," filed July 1, 2004, at 2.
[2] Id.
[3] Verizon ex parte at 19, quoting Ex Parte Letter from Joan Marsh, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 01-338, 98-147, 96-98 (Oct. 2, 2002).

Because the FCC's EEL usage restrictions bar AT&T from using EELs to provide long distance services, and because AT&T serves large business customers, it is not surprising that AT&T uses special access services.

Those carriers that use special access do so for business-specific reasons that in no way support the argument that special access is a substitute for DS-1 UNE loops.

- IXCs and carriers like Time Warner Telecom are using special access as CAPs, meaning that they aggregate huge volumes of traffic from large businesses, rather than serving one small business at a time. As such, they can better afford to pay inflated special access rates for their IXC businesses.
- Wireless providers have used special access services for decades, because they never had UNE access. As such, the fact that CMRS providers use special access, not UNEs, has nothing to do with the 1996 Act, and in no way demonstrates that CLECs could use special access in the same way CMRS providers do.
- Carriers that entered the market after 1996 tried to order UNEs, and were faced with (1) no facilities claims, which resulted in special access order, (2) commingling restrictions, which led to special access order. FCC clarified its rules last year for the first time, but special access damage was done. Carriers that sought to use UNEs were forced to use special access, which today allows the ILECs to count all those would-be UNE orders as special access orders. Perversely, the Bells now get to count those special access lines that they refused to provide as UNEs towards their "study" justifying elimination of UNEs.
- Carriers that Verizon claims are successfully using special access instead of UNEs are losing money every quarter. Time Warner Telecom posted a net loss of over $27 million in the second quarter of 2004. US LEC posted a net loss of over $5 million for the second quarter of 2004. The FCC cannot possibly rely on these carriers as evidence that special access is a substitute for UNEs.
- Biggest volume/term discounts are reserved for the big IXCs – smaller CLECs cannot come close to getting the pricing cited by the BOCs. AT&T can secure 25-30% special access discounts, but smaller ALTS members cannot. For example, BellSouth's Contract Tariff 011 allows for a discount of only 3.5% for a commitment of $6 million of DS1 annual billing in the first year and $7 million in the second year.
- Carriers using special access don't collocate – elimination of loop UNEs would strand hundreds of millions of dollars in collocation and facilities investment by CLECs using UNEs. Can't just wave a wand and convert an entire CLEC business plan from UNEs to special access.
- BOC special access services are not price regulated (FCC has granted pricing flexibility) and thus current rates could go up at will. Special access prices are based on cost studies from the 1980s and include legacy subsidies, and as such, are not competitively priced.

The D.C. Circuit decision in *USTA v. FCC* in no way compels the FCC to consider special access as a UNE substitute.

- The D.C. Circuit faulted the FCC for failing to consider special access in context of CMRS providers, but the court did not compel the FCC to reach any particular conclusion regarding special access. The D.C. Circuit said: "We recognize that, given the ILECs' incentive to set the tariff price as high as possible and the vagaries of determining when the price gets so high that the "impairment" threshold has been crossed, a rule that allowed the ILECs to avoid unbundling requirements simply by offering a function at lower-than-TELRIC rates might raise real administrability issues. Those complications might in principle support a blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment."[4]
- The D.C. Circuit left intact the FCC's conclusions regarding high-capacity loop impairment, including the extensive factual findings made by the FCC that it was economically, technically, and practically impossible for CLECs to self-provide DS-1 loops and EELs.
- As such, the FCC should treat special access availability as "irrelevant to impairment" because it is not a substitute for UNE loops.

Verizon's claims about interoffice transport are similarly flawed.

- To support its claim that interoffice transport routes are competitive, Verizon inspected central offices, and counted, for example, any collocated CLEC with an arrangement dating back to 1998 as a potential self-provisioning transport provider.[5] Then, if that CLEC had power running into its collocation arrangement, and any non-Verizon fiber optic cable terminating in that collocation space (regardless of where it actually went), Verizon counts that CLEC as an actual self-providing transport provider.[6] Verizon undertook no actual, real-time analysis of even a single specific route to determine if there were actual competitive routes, leading to the obvious conclusion that Verizon's "study" falls flat.

[4] USTA v. FCC, No. 00-1012, at 31 (2004).
[5] Verizon Verses/Lataille/Jordan/Reney Declaration at para. 11.
[6] Id. at para. 13.